VESTIME CORPORATION SDN BHD

v.

YBLE RESOURCES SDN BHD & ORS

HIGH COURT SABAH & SARAWAK, KUCHING
CLEMENT SKINNER J
[SUIT NO: 22-169-2005-I]
28 FEBRUARY 2006

CIVIL PROCEDURE: *Parties - Government, action against - Whether Ministry of defence a legal entity - Whether a Government Ministry can be sued in its own name*

CIVIL PROCEDURE: *Government proceedings - Injunction - Whether injunction will be granted where government will be affected indirectly - Whether temporary injunction may be granted against government*

CIVIL PROCEDURE: *Injunction - Interim injunction - Principles applicable - Bona fide serious issue to be tried - Balance of justice*

CONTRACT: *Specific performance - Privity of contract - Whether specific performance of a contract can be obtained against a non-party - Specific Relief Act 1950, s. 26(b)*

CIVIL PROCEDURE: *Receiver and manager - Appointment, of - Where imperative to keep business continuing as a going concern*

On behalf of the government, the Ministry of Defence ('MINDEF') had entered into a contract with the 1st defendant to rent and provide the necessary facilities and amenities to set up the Bukit Saban camp site for the National Service Programme ('the main contract'). The 2nd and 3rd defendants were directors of the 1st defendant and its main shareholders. The 1st defendant did not have the finances to undertake the main contract. The 1st defendant thus entered into a subcontract with the plaintiff ('the subcontract') to undertake the main contract as a partnership business. The sole purposes of this subcontract was to raise financing. The 1st defendant and plaintiff also entered into a Partnership Agreement ('the partnership agreement') whereby they agreed to become partners to carry out, perform and complete the main contract through the incorporation of the 6th defendant. The general scheme under the partnership agreement was that while the 6th defendant would manage and execute the main contract,

A all moneys paid by MINDEF in respect of the main contract would be channelled into a bank account in the name of the 1st defendant at Bank Muamalat.

Problems arose between the parties especially over money matters
B concerning the main contract. On 11 November 2005 the 1st defendant wrote to the plaintiff informing the latter that the 1st defendant had terminated the partnership agreement and the supplementary agreement and therefore its relationship with the 6th defendant had terminated. The 1st defendant claimed that the
C 6th defendant no longer had any authority to deal with or manage the main contract. By this time there was some RM1,558,391.80 payable by MINDEF under the main contract in respect of the performance and execution of the main contract by the 6th defendant. Fearing that the 1st defendant would obtain payment
D from MINDEF and dissipate the RM1.5 million, the plaintiff commenced this suit on 19 December 2005 and applied for various reliefs including an interim injunction and the appointment of a receiver and manager. The fourth defendant raised a preliminary objection to its being joined as a defendant and argued
E that any order of injunction granted against the 1st, 2nd and 3rd defendants would be tantamount to granting an indirect injunction against the government.

Held (allowing the plaintiff's application with costs):

F **(1)** MINDEF is not itself a legal entity – it is only a Ministry of the government and therefore there is no basis in law to sue it in its own name as a party to this action. (para 26)

(2) There is no legal impediment against obtaining an injunction
G against the 1st, 2nd and 3rd defendants even though the 1st defendant had entered into a transaction with the government and, therefore, the government is affected indirectly by the injunction. Even if the injunction granted against the 1st, 2nd and 3rd defendants affected the government, it did so only
H temporarily until the disposal of the suit. There is no prohibition against the grant of a temporary injunction against the government. (para 27)

(3) As between the plaintiff and MINDEF or government, there
I was no privity of contract to enable the plaintiff to bring this action or to claim any relief against MINDEF or the government. The plaintiff simply had no cause of action against MINDEF or the government. The provisions of s. 26(b) of

the Specific Relief Act did not apply because MINDEF or the government was not a party to the contract. MINDEF (government) was wrongly joined as the 4th defendant in this suit and should must be struck out as a party to this action. (paras 29 & 31)

(4) In relation to an *inter partes* application for interim relief, the approach to be taken in deciding the application is set out in *Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors* [1995] 1 CLJ 293. The questions to ask are first, whether the totality of the facts presented disclose a *bona fide* serious issue to be tried; if so, then to go on to consider where the justice of the case lies. In making this assessment all relevant matters must be taken into account, including the practical realities of the case. The remedy that the court is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and to maintain the *status quo*. In arriving at an assessment of where the balance of justice lies, the court cannot ignore the practical realities. (paras 32 & 60)

(5) As the 6th defendant was not at any fault and it was the party that was earning the proceeds under the main contract, it was imperative to keep it as a going concern by the appointment of a receiver and manager. The appointment of a receiver and manager would not involve the court in coming to any decision regarding the *bona fide* serious issues which have been identified for trial. (paras 65 & 66)

Case(s) referred to:

Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 CA ***(refd)***

Sabil Mulia (M) Sdn Bhd v. Pengarah Hospital Tengku Ampuan Rahimah & Ors [2005] 2 CLJ 122 CA ***(refd)***

Si Rusa Beach Resort Sdn Bhd v. Asia Pacific Hotels Management Pte Ltd [1984] 2 CLJ 13; [1984] 1 CLJ (Rep) 346 FC ***(refd)***

TSB Private Bank International SA v. Chabra & Anor [1992] 1 WLR 231 ***(refd)***

Legislation referred to:

Government Proceedings Act 1956, s. 29

Rules of the High Court 1980, O. 30 rr. 4, 5

Specific Relief Act 1950, ss. 20(1)(a), (b), (g), 26(b), 54(f)

Other source(s) referred to:
Lindley & Banks on Partnership, 18th edn, para 23-156

For the plaintiff - Shankar Ram (Francis Teron with him); M/s Thomas Shankar Ram & Co
For the 1st, 2nd & 3rd defendants - Satinder Singh Sandhu; M/s Sandhu & Co
For the 4th defendant - Mohd Taufik Mohd Yusoff FC
For the 5th defendant - Cila Nasu; M/s Yaacob & Ismail
6th defendant unrepresented

Reported by Amutha Suppayah

JUDGMENT

Clement Skinner J:

[1] This is the *inter partes* hearing of the plaintiff's application for various reliefs including an interim injunction and the appointment of a receiver and manager. On 19 December 2005 I granted, on *ex parte* application by the plaintiff, an injunction in the following terms:

> An order that the 1st, 2nd and 3rd defendants be restrained and an injunction be hereby granted restraining the 1st, 2nd and 3rd defendants until *inter partes* hearing or further order or until trial/ judgment whether by their agents, servants, directors or any other means howsoever from receiving the proceeds of payments from the 4th defendant under the main contract.

[2] This is now the *inter partes* hearing of the plaintiff's application for the reliefs sought. The facts giving rise to this application are these.

[3] In 2003 the Government of Malaysia initiated a programme to train youth in the country called the National Service Programme which would be implemented on behalf of the Government by the Ministry of Defence (hereafter 'MINDEF'). For this purpose National Service training camps were set up throughout the country. Under the programme the government would provide the instructors and trainers but the camp site at which the training would take place and all the infrastructure and facilities at the camp site, such as training courses, barracks and amenities would be procured and rented from third parties.

[4] In Sarawak the government decided to establish a training camp at Bukit Saban, Betong, Sri Aman Division. Accordingly on 7 November 2003 MINDEF entered into a contract with YBLE Resources Sdn Bhd (hereafter 'the 1st defendant') to rent and provide the necessary facilities and amenities to set up the Bukit Saban camp site (hereafter 'the main contract'). Very briefly, under the main contract, the 1st defendant would for a period of five years provide two lots of land as a site for the training as well as all the infrastructure, equipment, facilities and amenities mentioned in the agreement in return for which MINDEF would pay the 1st defendant various sums of money, at the times specified in the agreement.

[5] I will now introduce some of the personalities in this suit. Awang Mohd. bin Awang Bunsu and Nafsiah binti Mohd. Sa'ed are husband and wife. They are named as the 2nd and 3rd defendants in this action. They are directors of the 1st defendant and its main shareholders. The 1st defendant did not have the finances to undertake the main contract. For this the 2nd and 3rd defendants approached a company called Vestime Corporation Sdn Bhd, the plaintiff herein, through one Rosman bin Abu Samah who is related by marriage to them. He is also the Managing Director of Vestime Corporation Sdn Bhd. The approach was apparently made before the 1st defendant was awarded the main contract by MINDEF. On 8 November 2003 that is one day after the main contract was awarded to the 1st defendant, the 1st defendant entered into a sub-contract agreement with the plaintiff (hereafter 'the subcontract') in respect of the main contract. According to the plaintiff the parties did not intend to act on this sub-contract but it was to be used as a means of raising financing to enable the 1st defendant and the plaintiff to undertake the main contract as a partnership business. This is now disputed by the 1st, 2nd and 3rd defendant who say the sub-contract agreement is invalid and void. Be that as it may, on 3 March 2004 the 1st defendant and plaintiff entered into a Partnership Agreement ('the partnership agreement') whereby they agreed to become partners to carry out, perform and complete the main contract through the incorporation of a company called Pati Usaha Sdn Bhd (hereafter 'the 6th defendant'). In the partnership agreement the parties agreed that the shareholding in the 6th defendant should be as follows:

A

1st defendant	30%
Plaintiff	70%

while the Board of Directors of the 6th defendant shall consist of five persons, with three directors appointed by the plaintiff and two directors appointed by the 1st defendant.

B

[6] The general scheme under the partnership agreement was that while the 6th defendant would manage and execute the main contract, all moneys paid by MINDEF in respect of the main contract would be channelled into a bank account in the name of the 1st defendant at Bank Muamalat. This account was described by the parties as a 'non-checking account' because it was intended by the parties that no cheques could be drawn on this account by either party. It was intended that once the money from MINDEF was paid into this 'non-checking account', the 1st defendant would irrevocably instruct the bank to transfer all the funds in that account into an account in the name of the 6th defendant at Bank Muamalat after which the money would be dealt with in accordance with the provisions of the partnership agreement.

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D

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[7] After the main contract was placed in the hands of the 6th defendant it performed its duties under the partnership agreement because soon moneys under the main contract became payable to the 1st defendant but it seems that from the very start the parties experienced difficulties with each other over money matters concerning the main contract. Accusations and counter-accusations have been traded between the plaintiff and 1st, 2nd and 3rd defendants over the same and it is not possible nor desirable at this stage to express any view on these accusations, but from this tangled web of accusations I will try to set out certain events that took place regarding money payable under the main contract.

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[8] On 23 February 2004 the 1st defendant wrote to Bank Pembangunan Dan Infrastruktur Malaysia (hereafter 'the 5th defendant') assigning to them the proceeds under the main contract (hereafter 'the 1st notice of assignment'). On the strength of this assignment it seems the 5th defendant approved banking facilities of RM3 million to the plaintiff. The 1st, 2nd and 3rd defendants deny the validity of this assignment or any knowledge of it.

H

I

[9] The 1st defendant did not open the non-checking account at Bank Muamalat because it alleges that the bank would not allow such an account to be opened. The 1st defendant and the plaintiff then entered into a Supplementary Agreement on 21 April 2004 (hereafter 'the supplementary agreement'). So far as relevant to these proceedings under the supplementary agreement the 1st defendant was given a choice of either opening a 'non-checking' account or a joint signatory account so that moneys from MINDEF could be paid into such account. Initially the 1st defendant did not set up any account as envisioned but did so on 21 September 2004 by opening a joint signatory (with the plaintiff) account No. 1101-0001264-719 at Bank Muamalat. Payments from MINDEF were supposed to be paid into this account but the defendants say this account has remained dormant.

[10] Even after the supplementary agreement was entered into difficulties continued to exist between the parties over money matters. On or about 20 October 2004 the 5th defendant approved the plaintiff's application for banking facilities of RM3 million. According to the plaintiff this is the same facility approved earlier on 30 March 2004 to it by the 5th defendant but with amended terms. On 22 October 2004 the plaintiff requested the 1st defendant's consent for the assignment of the proceeds of the main contract as security to obtain finance from the 5th defendant. It is the contention of the plaintiff that it applied for such facilities pursuant to cl. 2.6.2 of the supplementary agreement where, according to the plaintiff, it was agreed that the plaintiff shall procure financing for the 6th defendant to manage the main contract. Following the plaintiff's request negotiations took place between the parties between 22 October 2004 to 29 December 2004 about the assignment of the proceeds of the main contract. During the negotiations the defendants showed resistance to such assignment and set certain conditions for the grant of consent including the allocation of more equity in the 6th defendant, while the plaintiff accused the 1st defendant of breaching the spirit of the partnership agreement. In turn the 1st defendant accused the plaintiff of not fulfilling its obligations under the partnership agreement. Nothing appears to have resulted from the negotiations because on 29 December 2004 the 1st defendant gave the plaintiff 14 days' notice to comply with cl. 10 of the partnership agreement to provide the required finance for the main contract. On 12 January 2005 on the plaintiff's alleged failure to do so, the

A 1st defendant (through its advocates) terminated the partnership agreement. The plaintiff does not accept the termination and disputes the 1st defendant's right to do so.

[11] By December of 2004 substantial sums of money were
B payable under the main contract. On 15 January 2005 the 1st defendant wrote to MINDEF instructing the later to pay all proceeds due under the main contract to the 1st defendant's account No. 1102-000-1929-05-3 at Bumiputra-Commerce Bank. This is not a joint signatory account with the plaintiff but operated
C solely by the 1st defendant.

[12] On 17 January 2005 the plaintiff's Kuala Lumpur solicitors wrote to the 1st defendant's lawyers complaining of bad faith on the part of the 1st defendant in trying to close the joint signatory account of the 1st defendant at Bank Muamalat.
D

[13] On 26 February 2005 the 1st defendant says it discovered that the proceeds of the main contract had been assigned to the 5th defendant without their knowledge and consent. This allegation is denied by the plaintiff who says that the 1st
E defendant was aware that the sub-contract agreement entered into between the plaintiff and 1st defendant one day after the main contract was awarded to the 1st defendant had been entered into for the purpose of procuring financing for the partnership business and that the 1st notice of assignment dated 23 February 2004,
F to enable the proceeds of the main contract to be paid to the 5th defendant, was signed by one Awangku Mohd. Salleh bin Pengiran Syed Shahminan who was formerly a director of the 1st defendant who has come forward to say on affidavit in these proceedings that the 1st, 2nd and 3rd defendants were fully aware of him
G doing so and had agreed to it, although this is now denied by the 1st, 2nd and 3rd defendants.

[14] On 3 March 2005 MINDEF wrote to the 5th defendant to say that it had no objection to the proceeds under the main
H contract being assigned to the 5th defendant and that such payment was supported by a notice of assignment (ie, the 1st notice of assignment) signed by the 1st defendant dated 23 February 2004.

I **[15]** The dispute between the plaintiff and 1st defendant over moneys payable under the main contract came to a head when the 1st defendant commenced legal action at the High Court in Kuching *vide* Suit 22-27-2005-III(I) (hereafter 'the 1st suit') on 9

March 2005 claiming, *inter alia*, that the partnership agreement and the supplementary agreement have been lawfully terminated and praying for injunctive reliefs. On the same day ie, 9 March 2005 the 1st defendant here (as plaintiff in that suit) obtained an interim *ex parte* injunction in the 1st suit restraining the plaintiff here (as defendant there) from disposing of or dealing with money in the joint account No. 1101-0001264-719 at Bank Muamalat or money paid to it by MINDEF under the main contract.

[16] The effect of the injunction obtained by the 1st defendant here in the 1st suit was to freeze all the proceeds under the main contract. Following the grant of the injunction in the 1st suit a meeting took place at MINDEF on 14 March 2005 at which the 1st defendant here and the plaintiff here agreed to withdraw all allegations against each other made to the various interested parties and for the 1st suit and the injunction to be withdrawn.

[17] On the same day ie, 14 March 2005, following the resolution of the differences between the 1st defendant and plaintiff, MINDEF wrote a letter to the 1st defendant here to say that MINDEF had no objection to the payment of proceeds under the main contract being made directly to the 5th defendant and that MINDEF would treat the 1st defendant's request (in its letter of 22 February 2005) for the proceeds to be paid to Bumiputra-Commerce Bank as cancelled.

[18] Following the resolution of their differences at MINDEF, the following sums of money representing proceeds of the main contract were dealt with in the following manner:

(a) On 17 March 2005 RM663,369.50 earlier paid by MINDEF to the 5th defendant was released to a joint savings account in the name of Rosman Abu Samah and Awang Mohd. bin Awang Bunsu (2nd defendant) at Affin Bank MINDEF Branch, Kuala Lumpur;

(b) On 18 April 2005 RM708,202.60 was paid by MINDEF into the 5th defendant's account and thereafter 5th defendant paid this sum into the joint savings account of the two persons mentioned in (a) above;

A (c) On 16 May 2005 RM355,225.40 was paid by MINDEF into the 5th defendant's account who thereafter paid the amount into the plaintiff's account at Bank Muamalat, Shah Alam. According to the plaintiff this sum was utilised to pay all creditors, suppliers and expenses under the main contract;

B (d) Between March, April and May 2005 the plaintiff collected three other payments from MINDEF ie, for RM412,085.50, RM638,555 and RM664,706.70 respectively which the 1st defendant alleges was not deposited into the 6th defendant's C account ie, A/C No. 1101-0001160-71-7 at Bank Muamalat.

[19] Matters between the plaintiff and 1st defendant did not improve despite the meeting at MINDEF because on 6 June 2005 the 1st defendant, through its lawyers, wrote to the plaintiff informing it that the 1st defendant intended to continue with the D 1st suit and to pursue its remedies there. In response the plaintiff, through its then lawyer, questioned the 1st defendant's move and warned it against interfering at the Bukit Saban Camp site, failing which injunctive relief and appropriate remedies would be applied for.

E

[20] The plaintiff alleges that unknown to it and without its consent or knowledge or that of the 5th defendant, the 1st defendant had written to MINDEF on 3 August 2005 to cancel its earlier instructions given under its 1st notice of assignment, F directing payment of proceeds under the main contract to the 5th defendant. The plaintiff apparently found out about what the 1st defendant had done when it received a letter dated 2 September 2005 from MINDEF informing it of the 1st defendant's instructions. It seems that the 1st defendant had executed a G document referred to as an 'Assignment of Right' (hereafter 'the 2nd assignment') in favour of Bumiputra-Commerce Bank whereby the 1st defendant assigned the proceeds from the main contract to be paid to Bumiputra-Commerce Bank. This much at least can be deduced from a letter dated 2 September 2005 written by H MINDEF to Bumiputra-Commerce Bank in which MINDEF refers to a letter dated 8 August 2005 from the bank and gives its (MINDEFs) consent to the 1st defendant assigning its rights under the main contract to Bumiputra-Commerce Bank.

I **[21]** On discovering what the 1st defendant had done the plaintiff protested to MINDEF. In its letters of 19 September 2005 and 21 October 2005 to MINDEF the plaintiff protested against MINDEF's refusal to continue making payment to the 5th

defendant; it also protested against MINDEF consenting to the 2nd assignment made by the 1st defendant. The plaintiff insisted that MINDEF should continue paying the proceeds of the main contract to the 5th defendant. It was the plaintiff's stand that the 2nd assignment was unlawful.

[22] Following the plaintiff's protests and objections MINDEF made two further payments to the 5th defendants. On 25 October 2005 it paid a sum of RM483,973 and RM180,733.70 respectively to the 5th defendant. In making these payments it seems MINDEF was in effect honouring the earlier 1st notice of assignment issued to it by the 1st defendant.

[23] On 11 November 2005 the 1st defendant wrote to the plaintiff informing the latter that it (the 1st defendant) had terminated the partnership agreement and the supplementary agreement on 12 January 2005 and therefore, according to the 1st defendant, its relationship with the 6th defendant had also terminated. The 1st defendant went on to state in its letter that the 6th defendant 'has no longer any authority to deal with and/or manage' the main contract. By this time there was some RM1,558,391.80 payable by MINDEF under the main contract in respect of the performance and execution of the main contract by the 6th defendant. Fearing that the 1st defendant would obtain payment from MINDEF and dissipate the RM1.5 million, the plaintiff commenced this suit on 19 December 2005 and applied for *ex parte* relief in the terms earlier mentioned.

[24] The 1st, 2nd and 3rd defendants object to the grant of the interim injunction as well as the plaintiff's application for the appointment of a receiver and manager in respect of the 6th defendant, and says the *ex parte* injunction should be discharged immediately. I will deal with the grounds relied upon by the defendants shortly, but first I must address certain preliminary objections raised by MINDEF.

[25] The plaintiff has named MINDEF as the 4th defendant in this suit. At the *inter partes* hearing federal counsel Encik Taufik bin Mohd. Yusoff appeared on behalf of MINDEF and raised a preliminary objection to its being joined as a defendant. He applied for MINDEF to be struck out as a party to this action. Encik Taufik relies on three grounds to do so:

(a) 'The Ministry of Defence Malaysia' which is the description of the party that has been cited as 4th defendant, is not a legal entity;

(b) any order of injunction granted against the 1st, 2nd and 3rd defendants would be tantamount to granting an indirect injunction against the Government which is not permissible in law;

(c) the plaintiff has no *locus standi* to bring this suit against MINDEF or the Government since it has no privity of contract with the Government.

[26] I agree with Encik Taufik that MINDEF is not itself a legal entity – it is only a Ministry of the Government and therefore there is no basis in law to sue it in its own name as a party to this action. Mr. Shankar Ram of counsel for the plaintiff concedes this point but says it is not fatal to the plaintiff's action as the plaintiff can amend its writ and statement of claim to name the proper party to this action which is the Government of Malaysia, which the plaintiff has in fact done by filing an application to amend in the course of this hearing. It is correct that the plaintiff can apply to join the Government as the correct party but for the reasons that appear shortly I think such a step will serve no purpose.

[27] With regard to Encik Taufik's second point, for which he relies heavily on s. 29 of the Government Proceedings Act 1956 in support of his contention, I cannot agree with it. In the first place the orders sought are to restrain the 1st, 2nd and 3rd defendants only and not the Government. I do not think there is any legal impediment against obtaining an injunction against them even though the 1st defendant has entered into a transaction with the Government and, therefore, the Government is affected indirectly by the injunction. In *Sabil Mulia (M) Sdn Bhd v. Pengarah Hospital Tengku Ampuan Rahimah & Ors* [2005] 2 CLJ 122 (CA) it was held that s. 29 of the Government Proceedings Act 1956 is not an impediment to restraining a private defendant from entering into a transaction with the Government. Secondly, even if the injunction granted the 1st, 2nd and 3rd defendant affects the Government, it does so only temporarily until the disposal of this suit and there is no prohibition against the grant

of a temporary injunction against the Government. In *Sabil Mulia* the Court of Appeal went on to say (at p. 134 per Gopal Sri Ram JCA):

> It has been settled since at least 1978 that s. 29 of the 1956 Act (ie, the Government Proceedings Act) **does not prohibit the grant of temporary injunctions** against the Government. In *Tengku Haji Jaafar & Anor v. Government of the State of Pahang* [1978] 2 MLJ 105 it was held that the section 'does not take away therefore the right of the court to grant an interlocutory injunction'. This court in *Kekatong Sdn Bhd v. Danaharta Urus Sdn Bhd* [2003] 3 CLJ 378 treated the ratio in *Tengku Haji Jaafar & Anor v. Government of the State of Pahang* as settled law. Although the Federal Court reversed our decision in that case on the constitutional point, our judgment on this point was approved sub silento. **Accordingly, it is too late in the day to argue that s. 29 bars the grant of an interlocutory or even an interim injunction against the Government.** (emphasis added).

So there is no reason to strike out MINDEF as a party on this ground either.

[28] With regard to Encik Taufik's third point I find that he is on firmer ground here. It was argued by Mr. Shankar Ram of counsel for the plaintiff that the plaintiff can sue MINDEF (the Government) because the 1st defendant had entered into the main contract with MINDEF. According to counsel, since the plaintiff had entered into the partnership agreement and supplementary agreement with the 1st defendant, the plaintiff can claim 'rights under the main contract with the 4th defendant' ie, MINDEF. I do not agree with this submission. The plaintiff is a complete stranger to the main contract entered into between the 1st defendant and MINDEF. By the partnership agreement and supplementary agreement the plaintiff may have acquired certain rights against the 1st defendant concerning the main contract, in that, the subject matter of their 'joint-venture' so to speak concerns the main contract, but not being a contracting party with MINDEF (Government), the plaintiff has no legal right to enforce directly against MINDEF (Government). It is plain for me to see from the facts and documents before the court that the real dispute is between the plaintiff and the 1st, 2nd and 3rd defendants and that such disputes arise out of the partnership agreement and supplementary agreement, not the main contract, in that, the parties dispute about where and to whom the moneys earned under the main contract are to be paid to as a result of

their having entered into the partnership agreement and supplementary agreement. That is of no concern of MINDEF (Government). MINDEF may have been willing to give effect to the notices of assignment it received but that does not mean that the plaintiff has acquired any legal right against MINDEF (Government).

[29] Mr. Shankar Ram submitted that the plaintiff can rely on s. 26(b) of the Specific Relief Act to seek specific performance of the main contract against MINDEF. I do not agree with this submission. The provisions of s. 26(b) can have no application to the facts of this case. That section allows specific performance against 'any other person claiming under a party to the contract by a title arising subsequent to the contract'. MINDEF or the Government is not such a party. As far as the main contract is concerned MINDEF or the Government is a party to that agreement in its own right and does not need to claim 'under a party' to it if it wishes to enforce any rights in the main contract, but as I said, as between the plaintiff and MINDEF or Government, there is simply no privity of contract to enable the plaintiff to bring this action or to claim any relief against MINDEF or the Government. The plaintiff simply has no cause of action against MINDEF or the Government.

[30] With regard to the case of *T.S.B. Private Bank International S.A. v. Chabra & Anor* [1992] 1 WLR 231 which was relied on by Mr. Shankar Ram, I find that what was said there has no application here. In that case it was held that an injunction could be granted against a co-defendant against whom no cause of action lay, provided that the claim for injunction was ancillary and incidental to the plaintiff's cause of action against the other co-defendant. On the facts of that case it was found that since the injunction made against the first defendant alone there was inadequate to protect the plaintiff, it was appropriate to grant the injunction against the second defendant in support of the existing legal right claimed by the plaintiff against the first defendant there. But I do not see that an injunction, if granted against the 1st, 2nd and 3rd defendants here is inadequate to protect the plaintiff. MINDEF has acted with an even hand between the plaintiff and defendants. I am confident that if MINDEF is made aware of and served with the terms of any injunction granted against the 1st, 2nd and 3rd defendants MINDEF (Government) would not make payment of the proceeds under the main contract contrary to or in defiance of the terms of such injunction.

[31] For the above reasons I uphold the third ground of objection raised by Encik Taufik. I find that MINDEF (Government) was wrongly joined as the 4th defendant in this suit. I order that it be struck out forthwith as a party to this action, with costs.

[32] Returning now to the plaintiff's *inter partes* application for interim relief the approach that I should take in deciding this application is set out for my guidance by the Court of Appeal in *Keet Gerald Francis Noel John v. Mohd. Noor bin Abdullah & Ors* [1995] 1 CLJ 293. Briefly stated, that case held that at this stage of the case the questions I should ask myself are first, whether the totality of the facts presented before me discloses a *bona fide* serious issue to be tried; if so, then I should go on to consider where the justice of the case lies. In making this assessment I must take into account all relevant matters, including the practical realities of the case. Further, I must keep in the forefront of my mind that the remedy that the court is asked to administer is discretionary, intended to produce a just result for the period between the date of this application and the trial proper and to maintain the *status quo*. With that I turn to consider the questions that I need to ask myself.

Is There A Bona Fide Serious Issue To Be Tried?

[33] Although the immediate dispute between the parties concerns who should receive the moneys payable under the main contract and into which account such moneys should be paid, at the heart of the dispute between the plaintiff and the 1st, 2nd and 3rd defendants lies the partnership agreement and the supplementary agreement. This is so because on the one hand, while the plaintiff contends that by trying to divert the proceeds of the main contract into the 1st defendant's own account at Bumiputra-Commerce Bank the 1st defendant had acted in breach of the partnership agreement and that the 2nd and 3rd defendant had acted in breach of their fiduciary duties as directors of the 6th defendant; on the other hand, the 1st, 2nd and 3rd defendants deny that they have so acted, and instead assert that the 1st defendant was entitled to request MINDEF to pay the proceeds of the main contract into its account at Bumiputra-Commerce Bank as the partnership agreement and supplementary agreement have been terminated since 12 January 2005. The plaintiff has, however, in the affidavits filed on its behalf in these proceedings,

A seriously disputed that the partnership agreement and supplementary agreement have been so terminated or that the 1st, 2nd and 3rd defendants have the right to do so.

[34] The 1st, 2nd and 3rd defendants maintain that they had the B right to terminate the partnership agreement and the supplementary agreement because the plaintiff had failed to fulfil its obligation to provide the necessary financing to undertake the main contract by the 6 defendant, but this is disputed by the plaintiff. The plaintiff says it has procured or provided in February C 2004 an Advance Payment Bond for RM1,000,000 and a Security Bond for RM200,385 in favour of MINDEF. The plaintiff says it is a surety to these bonds and are exposed to liability under them should MINDEF call on these bonds under the main contract. The plaintiff further says that in 2003 and 2004, it contributed, D whether directly or indirectly through the 6th defendant, towards the construction of facilities and the provision of amenities at the Bukit Saban Camp site costing some RM3,179,365.60. The plaintiff says that todate its total gross outlay in the partnership business is some RM5,319,171.68. Accordingly the plaintiff denies E that it is in breach of the partnership agreement or supplementary agreement, which it maintains has not been lawfully terminated. In particular the plaintiff asserts that whatever complaints the 1st, 2nd and 3rd defendants may have had against it regarding the partnership agreement and supplementary agreement, all such F allegations had been withdrawn by the 1st defendant at the meeting held at MINDEF on 14 March 2005 where the 1st defendant even agreed to withdraw the 1st suit and the injunction it had obtained against the plaintiff. In such circumstances the plaintiff says the 1st defendant cannot resile from its earlier G agreement. According to the plaintiff the defendants cannot now be heard to say that the partnership agreement and supplementary agreement had been terminated.

[35] From the totality of the facts before me I find the question H whether the partnership agreement and supplementary agreement has been lawfully terminated discloses a *bona fide* triable issue, which it is not suitable or appropriate to decide at this stage of the case. I also find that to arrive at a finding on the above issue the court will have to consider and decide on facts which are I seriously disputed, such as, whether the main contract is an asset of the 6th defendant or whether the plaintiff was in breach of its obligation to provide the necessary financing to enable the main

contract to be undertaken through the 6th defendant which question must be considered in the light of the plaintiff's assertion that it has so far incurred a gross outlay of some RM5,319,171.68 towards the partnership business. At the moment the plaintiff's assertion that it is not in breach of its obligations under the partnership agreement and that it had expended these large sums of money cannot be dismissed out of hand because they must be considered against a background where the 1st defendant had agreed to withdraw all its allegations against the plaintiff at the meeting at MINDEF on 14 March 2005. It will be recalled that the reason given by the 1st defendant for terminating the partnership agreement on 12 January 2005 was the alleged failure of the plaintiff to provide the required financing for the main contract. Since the 1st defendant agreed to withdraw all its allegations against the plaintiff at the MINDEF meeting on 14 March 2005, would this not have included the allegation that the plaintiff had failed to provide the necessary financing as well? Of course the 1st defendant now says that it intends to pursue with the 1st suit, but for present purposes the plaintiff's contention that the principal agreement and supplementary agreement have not been terminated is a fairly arguable proposition.

[36] Quite apart from the above, the 1st, 2nd and 3rd defendants have questioned, in these proceedings, the basis upon which the plaintiff was able to obtain a loan of RM3 million from Bank Pembangunan Dan Infrastruktur Malaysia Bhd the 5th defendant herein, which loan the plaintiff maintains was raised for the 6th defendant's purposes. According to the defendants it was on the strength of the sub-contract agreement and the 1st notice of assignment that the plaintiff obtained the loan from the 5th defendant, but the defendants say the sub-contract agreement and 1st notice of assignment is invalid and void as it was not authorised by the 1st defendant's Board of Directors nor executed by the 1st defendant. In my view the assertion of the defendants regarding the validity of the sub-contract and the 1st notice of assignment are not matters which are suitable to be decided at this stage of the proceedings. They give rise to serious issues that need to be investigated further because (a) the plaintiff maintains that the sub-contract was entered into for the purpose of raising finance for the partnership business and (b) the 1st notice of assignment was signed by one Awangku Mohd. Salleh bin Pengiran Syed Shahminan a former director of the 1st defendant.

A He has come forward to say that the 1st, 2nd and 3rd defendants had agreed to him doing so. In the light of these seriously disputed facts, it is not appropriate to decide the issue here.

[37] Having found that there is a *bona fide* serious issue that
B requires to be tried, I now move on to consider where the balance of justice lies in this case.

The Balance Of Justice

[38] In making my assessment on this aspect of the application I
C have taken into consideration the following matters:

Are Damages An Adequate Remedy?

[39] It is the contention of the defendants that an injunction
D should not be granted to the plaintiff because by cl. 13(b) of the partnership agreement, on its termination the plaintiff's claim is contractually limited to obtaining a refund of its 'total advancement made' to the 6th defendant at the date of breach of the partnership agreement. Accordingly the defendants contends that
E since compensation in money is an adequate relief to the plaintiff, the plaintiff should be left to its remedy in damages in the event it wins this case by reason whereof the court should hold that the partnership agreement is not specifically enforceable under s. 20(1)(a) of the Specific Relief Act.

F **[40]** I do not find this to be so. The entitlement of the plaintiff to compensation for a breach of the partnership agreement only represents one aspect of the consequences that flows from the breach. If an injunction is not granted at this stage, and the proceeds of the main contract are diverted into the hands of the
G defendants solely, it is not only the rights of the plaintiff under the partnership agreement which will be affected, other consequences also flow. The operations of the 6th defendant will be severely affected if it is starved of funds to manage and operate the main contract. Not only will the existence of the 6th defendant be
H placed in jeopardy, so too will the main contract if the 6th defendant cannot function effectively and efficiently in providing the services and amenities required under the main contract. I do not regard damages as an adequate remedy for the plaintiff if the 6th defendant is forced to fold-up its operations or the main
I contract is lost forever to the partnership business.

[41] On the converse hypothesis, if the defendants were to eventually succeed at the trial, it is my view that damages would be an adequate remedy for them. The 6th defendant would have continued to undertake the main contract and it would then be a question of assessing what damages are payable by the plaintiff to the defendants for having breached the partnership agreement. In this regard the defendants have not questioned the ability of the plaintiff to meet its undertaking in damages.

Has The Plaintiff A Cause Of Action And Locus Standi?

[42] It was contended by the defendants that an injunction should not be granted to the plaintiff as it is seeking to enforce rights belonging to the 1st defendant under the main contract to which it is not a party. Hence the defendants contend that the plaintiff has no cause of action against the defendants and no *locus standi* to bring this action. I do not agree. What the plaintiff complains about here is the alleged breach by the 1st defendant of the partnership agreement to which it is a party. As against the 2nd and 3rd defendant, the plaintiff, as a party entitled to 70% of the equity in the 6th defendant, alleges that they are in breach of their fiduciary duties towards the 6th defendant as directors thereof. In my view not only have sufficient facts been pleaded by the plaintiff, but also sufficient details and particulars have been disclosed in the affidavits about the 1st defendant, acting through the 2nd and 3rd defendants, trying to divert the proceeds of the main contract away from the 6th defendant and into the 1st defendant's account, to disclose a cause of action against the 1st defendant for breach of the partnership agreement and against the 2nd and 3rd defendants for breach of their fiduciary duties towards the 6th defendant. As I said, the plaintiff is not only a contracting party as far as the partnership agreement is concerned but also entitled to a 70% interest in the 6th defendant's equity. Accordingly there is no question that the plaintiff has *locus standi* to file this suit.

Prohibition Against 1st Assignment And No Consent For 1st Assignment

[43] The defendants point out that the main contract contains a prohibition against the 1st defendant assigning away its rights under the contract without MINDEF's prior consent. According to the defendants not only was the 1st notice of assignment made without MINDEF's consent, it was also made without the 1st defendant's consent. Therefore it is invalid and ineffective. I see nothing in the point taken in the context of the balance of justice

in this case. In the first place the 1st notice of assignment was signed by Awangku Mohd. Salleh bin Pengiran Syed Shahminan as a former director of the 1st defendant. Although the defendants dispute his authority to have done so, he has affirmed an affidavit in these proceedings saying that the defendants agreed to him doing so. The court is not in a position to decide this issue on affidavit evidence which is disputed. Until the court does so, the defendants' contentions about lack of authority or that it had not given its consent to the 1st assignment cannot be taken into the weighing when considering the balance of justice. In the second place, MINDEF is well aware of how the main contract is being carried out and where the proceeds of the main contract were being paid to because on 3 March 2005 MINDEF wrote to the 5th defendant to say that it had no objection to the proceeds under the main contract being assigned to the 5th defendant. MINDEF also indicated in the same letter that such payment to the 5th defendant was supported by the 1st notice of assignment dated 23 February 2004. Further, it will be recalled that after the 1st defendant here filed the 1st suit and obtained an injunction against the plaintiff here, a meeting was held between the disputing parties at MINDEF on 14 March 2005. As MINDEF was well aware that the proceeds of the main contract had been assigned away and had no objection to it I do not see how the point now taken by the defendants can be an impediment against the grant of an injunction in this case.

No Averment That Plaintiff Is Ready To Perform Contract

[44] It was contended by the defendants that the plaintiff's statement of claim is fatally flawed as it does not contain an averment that the plaintiff is ready and willing to perform its part of the partnership agreement and supplementary agreement, therefore the plaintiff has no cause of action for the specific performance it prays for in prayer (22) of the statement of claim.

[45] I see nothing in this point. It raises a point of pleading. It is raised during interlocutory proceedings when the pleadings are usually incomplete. While it is true that the plaintiff's statement of claim does not contain an averment that it is ready to perform its part of the contract, such an averment is in fact contained in its reply and defence to counterclaim. While it is desirable that the averment should have been made in its statement of claim, what possible prejudice could the defendants have suffered by the plaintiff having made the averment in its reply and defence to

counterclaim? I cannot see any and the defendants have not been able to show any, apart for raising it as a point of pleading. In the circumstances I do not find the plaintiff's pleadings fatally flawed as alleged. Even if the plaintiff had not made the averment in its reply and defence to counterclaim I am of the view that the plaintiff is at liberty to apply to amend its statement of claim to do so.

The Partnership Agreement And Supplementary Agreement Are Not Specifically Enforceable

[46] It was contended by the defendants that the plaintiff should be refused the injunction and other reliefs prayed for in this application because it is seeking to restrain the breach of a contract which is not specifically enforceable. According to the defendants such relief is not available because s. 54(f) of the Specific Relief Act 1950 states that:

> 54 An injunction cannot be granted
>
> (f) to prevent the breach of a contract the performance of which would not be specifically enforced.

[47] According to the defendants, the partnership agreement and the supplementary agreement are not specifically enforceable because:

(a) compensation in money would be an adequate relief for the plaintiff if these agreements were breached. I have already dealt with this point earlier and will not repeat here what I said about damages not being an adequate remedy for the plaintiff;

(b) they require the constant supervision of the court and the employment of persons with personal qualifications for a period longer than three years and is therefore caught by ss. 20(1)(b) and 20(1)(g) of the Specific Relief Act. I see nothing in the point taken. Under the scheme of the National Service training programme, it is MINDEF which provides the specialised personnel who conduct the training and instruct the youth. What the 6th defendant provides is the infrastructure, buildings and amenities. By all accounts these are already in place. Accordingly the defendants' argument about the partnership agreement and supplementary agreement requiring minute and constant supervision with the provision of persons with qualifications comes to nought.

[48] Quite apart from what I have just said, I should point out that the same arguments which the defendants have raised here about s. 54 of the Specific Relief Act and ss. 20(1)(b) and 20(1)(g) of the same Act were also raised, but firmly rejected as capable of constituting a reason to refuse the grant of an interim injunction by the Federal Court in *Si Rusa Beach Resort Sdn Bhd v. Asia Pacific Hotels Management Pte Ltd* [1984] 2 CLJ 13; [1984] 1 CLJ (Rep) 346. The decision in *Si Rusa Beach Resort* found specific mention by the Court of Appeal in *Keet Gerald Francis Noel John v. Mohd. Noor bin Abdullah (supra)* when discussing the correct approach to be adopted by the court and the stages of reasoning involved in the process of arriving at a conclusion as to whether interlocutory injunctive relief should be granted or withheld. In *Keet Gerald Francis Noel John*'s case, this is what the Court of Appeal said (per Gopal Sri Ram JCA) at p. 303:

> In *Si Rusa Beach Resort Sdn Bhd v. Asia Pacific Hotels Management Pte Ltd* [1985] 1 MLJ 132, the plaintiff and defendant entered into an agreement under which the plaintiff was to manage the defendant's hotel for a period of ten years. Disputes having arisen, the plaintiff obtained an *ex parte* interim injunction restraining the defendant from interfering with the plaintiff's running of the defendant's hotel. An application to set aside that injunction having been refused, the defendant appealed to the Federal Court. On appeal it was argued that the agreement in question being for a period longer than three years, it could not be specifically enforced. Reliance was placed on s. 20(1)(g) of the Specific Relief Act 1950 which provides as follows:
>
> > The following contracts cannot be specifically enforced:
> >
> > (g) a contract the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date;
>
> Counsel for the defendant then submitted that by reason of s. 54(f) of the Specific Relief Act 1950, no injunction (meaning a permanent injunction) could be granted to prevent the breach of a contract not specifically enforceable. It was then argued, relying on the decision in *Vethanayagam v. Karuppiah & Ors* [1968] 1 MLJ 283, that an interim injunction cannot be granted if a permanent injunction did not lie.
>
> These arguments, which appeared to provide a complete answer to the plaintiff's claim on merits, were rejected by the Federal Court.

Abdul Hamid CJ (Malaya), delivering the judgment of the court said ([1985] 1 MLJ 132 at p 135):

> While we appreciate that these questions are crucial indeed they are the main grounds upon which the appellant's case rests, we do not, however, see the necessity at that stage for the learned judge to decide on these difficult points of law.
>
> Suffice for the learned judge to decide, and this he did, that there are serious questions that have arisen for trial. While we agree that there are serious questions of law we are also of the view that these questions are relevant for consideration in determining the grant or otherwise of an interim injunction but the question is should it be the court's business to resolve these serious and difficult questions of law at that stage of the litigations? We think not.

[49] Accordingly, the question whether the partnership agreement and supplementary agreement are specifically enforceable in the light of ss. 54(f), 20(1)(b) and 20(1)(g) of the Specific Relief Act 1950 are not suitable to be decided at this stage of the case.

The 1st Defendant Taking Over The Camp Site

[50] There is uncontroverted evidence that after the plaintiff filed this suit and obtained its *ex parte* injunction on 19 December 2005 to restrain the 1st, 2nd and 3rd defendants from receiving the proceeds of payment under the main contract, the 1st defendant sent in its security guards to take over the Bukit Saban Camp site on or about 31 December 2005. The plaintiff has vehemently complained about what the 1st defendant has done and says this is another good reason why the injunctive relief sought in this application should be granted.

[51] The 1st defendant has sought to justify its taking over of the training camp on the ground that it has terminated the partnership agreement and supplementary agreement. It also says that its presence at the camp site cannot be regarded as unlawful or as a trespass because it is they who are the contractors under the main contract and had made available the camp site to MINDEF. I do not agree with these arguments. In the first place, even though it may be the contracting party in the main contract, as far as its relationship with the plaintiff is concerned it cannot pretend and behave as if the partnership agreement and supplementary agreement do not exist. Under these agreements it was the 6th

defendant who was entrusted to undertake and operate the main contract at the Bukit Saban camp site and, therefore, entitled to its control and possession. Although the 1st defendant alleges that it has terminated the partnership agreement and supplementary agreement, this is seriously challenged by the plaintiff. Further, the 1st defendant has at the meeting at MINDEF on 14 March 2005 agreed to withdraw all allegations against the plaintiff including the 1st suit. As I said before, the question whether the partnership agreement and supplementary agreement have been validly terminated gives rise to a *bona fide* serious issue to be tried. Until that question is decided it would be unjust to allow the 1st defendant to steal a march on the plaintiff by taking over the camp site and behaving as if the partnership agreement and supplementary agreement has in fact been terminated and causing difficulties to the 6th defendant in performing the main contact. In the second place, even though it may have been the 1st defendant who made available the camp site to MINDEF under the main contract, the question of maintaining security at the camp site should be a matter for the 6th defendant who operates and manages the main contract on behalf of both the plaintiff and 1st defendant. Accordingly the 1st defendant's excuse for taking over the camp site is not acceptable to me. I also find its argument about not being a trespasser irrelevant here in the context of the plaintiff's complaint, which is that pending the resolution of the question whether the partnership agreement and supplementary agreement have been terminated, it is wrongful for the 1st defendant to take over possession of the camp site from the 6th defendant who has been given possession of it by virtue of the partnership agreement and supplementary agreement.

Unclean Hands

[52] It is the 1st defendant's complaint that the plaintiff should be refused the injunctive relief that it seeks because it has offended against the maxim 'he who comes to equity must come with clean hands'. The 1st defendant says the plaintiff comes to court with unclean hands, because firstly, it was said that the plaintiff had throughout its negotiations with the 1st defendant on the assignment of the proceeds of the main contract to finance the works during the period 22 October 2004 to 29 December 2004, suppressed and concealed from the 1st defendant that it (the plaintiff) was in possession of the 1st notice of assignment signed by the 1st defendant's former director Awangku Mohd. Salleh bin Pengiran Syed Shgahminan. I see nothing in this point. Contrary

to what the 1st defendant alleges, Awangku Mohd. Salleh has come forward to say that the 1st defendant did know of the 1st notice of assignment. So it is not possible at this stage of the case to decide whether the plaintiff has behaved in the manner the defendants accuse it of.

[53] Secondly, it was said that the plaintiff had unclean hands because (i) the plaintiff obtained the loan facility of RM3 million from the 5th defendant knowing that the 1st defendant's Board of Directors had refused to agree to an assignment of the proceeds of the main contract, and (ii) the assignment of proceeds of the main contract had not received the prior consent of MINDEF. I do not see how it can be said that these matters show the plaintiff has unclean hands. In the first place the plaintiff was granted the RM3 million facility by the 5th defendant on the strength of the 1st notice of assignment which, according to the 1st defendant's former director Awangku Mohd. Salleh, the 1st defendant had agreed to. In the second place, MINDEF said it had no objection to the assignment of the proceeds of the main contract to the 5th defendant even though its prior consent had not been sought to the assignment. So I do not agree that the plaintiff has unclean hands as alleged.

[54] Thirdly, it was said that the plaintiff had obtained the loan facility of RM3 million from the 5th defendant on the security of the proceeds of the main contract in its own name and not that of the 6th defendant. It was further said that the plaintiff had paid some RM1,715,347.20 received from MINDEF into its account at the 5th defendant's bank. Accordingly the defendants complained that the 6th defendant had no control over the utilisation of this facility. I see nothing in this point. The plaintiff does not deny that it had done these things but says that the loan was for the benefit of the 6th defendant and the account it operates is for the benefit of the 6th defendant as well. Whether what the plaintiff says is true or not is a matter that cannot be decided here. Besides the 1st defendant had agreed to the arrangement when it gave MINDEF the 1st notice of assignment in favour of the 5th defendant. I do not see how, at this stage of the proceedings, the 1st defendant can say the plaintiff's hands are unclean.

Full And Frank Disclosure

[55] It is alleged by the defendants that in applying for *ex parte* relief the plaintiff had not made full and frank disclosure on such matters like it having received payment of RM1,715,347.20 from MINDEF which was paid into its own account at the 5th defendant's bank and not into the 6th defendant's bank account. It was also said that the plaintiff had not disclosed to the court the full particulars about various accounts that were supposed to be opened at various banks for the partnership business. I see nothing in the point taken. I agree with counsel for the plaintiff that the amount of RM1,715,347.20 which the plaintiff refers to was part of the moneys paid out by MINDEF until about 25 October 2005 under mutual arrangements that had been made between the parties after the meeting at MINDEF on 14 March 2005 when the 1st defendant withdrew all allegations against the plaintiff. The 1st, 2nd and 3rd defendants were obviously happy to go along with the way the proceeds under the main contract were being divided on its receipt from MINDEF. It therefore lies ill in the mouth of the defendants to now accuse the plaintiff of not disclosing where the money was paid to. The defendants also complained that the plaintiff had failed to disclose to the court that the defendants had made substantial payments towards performance of the main contract which they say amounts to some RM1.4 million, or to disclose that in respect of the Advanced Payment Bond and the Security Bond which it provided to MINDEF the plaintiff had only paid an amount equivalent to 20% of their value to do so, with the balance coming from payments received from MINDEF. The plaintiff disputes and denies these allegations, but even if true I do not regard them as material non-disclosure which would have materially affected the exercise of the court's discretion in granting the *ex parte* order to the plaintiff on 19 December 2005. The question before the court then was whether there was a real danger that the defendants would divert the RM1.5 million which MINDEF was ready to pay, into the 1st defendant's own account. The matters allegedly not disclosed were not material to that question and even if disclosed could not have affected the exercise of the court's discretion in granting the *ex parte* order.

[56] With regard to the complaint that the plaintiff had not disclosed to the court that some of the reliefs which it claims in this suit are already claimed by it in its counter-claim in the 1st suit, I should point out that the plaintiff did in its certificate of

urgency make disclosure about the 1st suit. Further, the injunction it claims in this action is to restrain the defendants from diverting the RM1.5 million receivable from MINDEF. This is not a matter covered in the 1st suit. Accordingly I do not find that there has been a failure on the plaintiff's part to make full and frank disclosure as alleged.

Delay

[57] According to the defendants the plaintiff should not be granted the interim injunction it seeks because it has failed to act with promptitude. The defendants say the plaintiff has been guilty of reasonable delay in coming to court because:

(i) the 1st defendant had terminated the partnership agreement and supplementary agreement on 21 January 2005;

(ii) the plaintiff knew by 6 June 2005, when it would have received the 1st defendant's lawyer's letter informing it so, that the 1st defendant intended to pursue with its earlier action in the 1st suit. As a result of this letter, the plaintiff's then lawyer wrote back threatening to apply for 'injunctive reliefs';

(iii) on 2 September 2005 the 1st defendant had written to MINDEF for the proceeds of the main contract to be paid into its account.

[58] Accordingly it is the submission of the defendants that if time is to be reckoned from the time of termination of the partnership agreement and supplementary agreement, the delay in seeking relief is 11 months. If time is to be reckoned from the 1st defendant's notice given on 6 June 2005 informing the plaintiff that it intended to pursue with the 1st suit, the delay is at least six months. If time is to be reckoned from 2 September 2005 when the 1st defendant gave instructions to MINDEF to pay the proceeds of the main contract into its own account, then the defendant say there is an unexplained delay of three months.

[59] I do not agree with this submission of the defendants. I find that the plaintiff has not delayed in coming to court for relief. I say so for the following reasons. It must not be overlooked that despite the 1st defendant having allegedly terminated the partnership agreement on 21 January 2005, and thereafter withdrawing all its allegations against the plaintiff including the 1st suit, but deciding on 6 June 2005 to continue with the 1st suit,

A the 1st defendant did not take any steps to divert the proceeds of the main contract until 3 August 2005 when it wrote to MINDEF to cancel the 1st notice of assignment, but this was not known to the plaintiff. The plaintiff only discovered the 1st defendant's attempt to divert the money on 2 September 2005. B But what is of importance is that on learning of the 1st defendant's attempt to divert the moneys, the plaintiff did not remain silent or sit on its rights. The plaintiff immediately protested to MINDEF in the strongest possible terms. It wrote 2 letters to MINDEF on 19 September 2005 and 21 October 2005. And it C seems that the plaintiff's remonstrations were successful because after that on 25 October 2005 MINDEF made 2 further payments of the proceeds of the main contract to the plaintiff's account with the 5th defendant. It was after 11 November 2005 when the 1st defendant wrote to the plaintiff stating that it (the D 1st defendant) had terminated its relationship with the 6th defendant and that the 6th defendant 'has no longer any authority to deal with and/or manage' the main contract that the plaintiff sought the protection of the court. When viewed properly in the light of the events I have just described I do not find any delay E on the part of the plaintiff in having come to court by 19 December 2005.

Practical Realities

F **[60]** In arriving at an assessment of where the balance of justice lies in this case I cannot ignore the practical realities before me. Here the parties had agreed for the 6th defendant to operate and manage the main contract. It has been doing so and by all accounts it has done so successfully because if it had not G MINDEF would not pay out the large sums of money it has under the main contract. But 1st defendant has embarked on a course of action which will prevent the 6th defendant from carrying out the main contract. It has taken steps to divert the proceeds of the main contract into its own account and in effect away from the 6th defendant. It has also taken over possession H of the camp site. Given the above situation, on the totality of the facts before me, in my judgment if the defendants are not restrained from diverting the proceeds under the main contract to their own account and the *status quo* is not restored to the I situation that prevailed at the camp site before the 1st defendant took it over, then far greater harm would result by the refusal of the injunction sought than by its grant.

[61] For all the above reasons I grant an injunction to the plaintiff in the terms hereafter set out.

[62] I now turn to consider the plaintiff's application for the appointment of a receiver and manager in respect of the 6th defendant. The plaintiff says that unless there is such an appointment the 6th defendant would not be able to function properly and effectively undertake and manage the main contract especially as the parties are now at a deadlock in the 6th defendant. Given the fact that the defendants are trying to divert the proceeds of the main contract and have taken over possession of the camp site, the plaintiff says that there is an urgent and real need for the appointment of a receiver and manager in respect of the 6th defendant. According to the plaintiff a receiver and manager would be the best person pending the trial to manage and protect the main contract which, according to the plaintiff is an asset of the 6th defendant.

[63] The defendants object to the appointment of a receiver and manager on several grounds. They first say that there are no valid reasons to justify such an appointment because the partnership agreement and supplementary agreement has been terminated; that the 1st defendant is entitled to possession of the camp site; that there has been delay on the part of the plaintiff in coming to court; that there is no dissipation of assets and contrary to the plaintiff's contention the main contract was never an asset of the 6th defendant. With the exception of the point that the main contract is an asset of the 6th defendant, I have already dealt with and expressed my views on each of the other reasons given by the defendants for objecting to the appointment of a receiver and manager. It suffices that I say that for the reasons I have already given I do not agree with the defendants' contentions. With regard to the contention that the main contract is an asset of the 6th defendant, it is my view that it is not suitable to decide this question at this stage of the proceedings.

[64] It was next said that since the plaintiff is not seeking a dissolution of the partnership business, there ought not to be an appointment of a receiver and manager. In support of what he said counsel for the defendants referred me to the following passage in *Lindley & Banks on Partnership* (18th edn) at para. 23-156 where it is stated:

A The general reluctance of the courts to interfere between partners otherwise than with a view to dissolution has already been noticed, and is nowhere more apparent than in the present context. Indeed, Lord Lindley wrote:

B > Court of justice are by no means anxious to take upon themselves the management of a partnership business, and they will, it is said, never do so, save with a view to a dissolution or final winding up of the affairs of the concern.

C This rule still appears to hold good in the case of applications for the appointment of a receiver and manager, since there is no reported instance in which such an appointment has been made in the case of an ongoing partnership. Indeed, in such cases as have come before the courts, relief has always been refused.

[65] In my view the above passage reflects 'the general D reluctance' of the courts, but it is also my view that each case must be decided on its own particular facts. On the fact before me, to refuse the appointment of a receiver and manager simply because the plaintiff has not asked for a dissolution of the partnership business would result in the 6th defendant suffering E dire consequences. It would leave the 6th defendant in a precarious position since, according to counsel for the plaintiff, the affairs of the 6th defendant are in a situation of deadlock with the ongoing dispute and impasse between the plaintiff and defendants. Further as I said earlier the operations of the 6th defendant will F be severely affected if it is starved of funds to manage and operate the main contract. Not only will the existence of the 6th defendant be placed in jeopardy, so too will the main contract if the 6th defendant cannot function effectively and efficiently in providing the services and amenities required under the main G contract. If the 6th defendant is forced to cease its operations there is a danger that the main contract will be lost forever to the partnership business. As the 6th defendant is not at any fault in this whole dispute and it is the party that is earning the proceeds under the main contract it is my view that it is imperative to keep H it as a going concern by the appointment of a receiver and manager.

[66] It was next said by the defendants that if a receiver and manager is appointed it would in effect be deciding disputed rights I or prejudging the action itself. I do not agree. The appointment is being made to keep the 6th defendant going as a viable concern.

No decision is being made regarding the facts in issue as alleged. In fact the appointment of a receiver and manager would not involve the court in coming to any decision regarding the *bona fide* serious issues which have been identified for trial.

[67] It was lastly said that the appointment of a receiver and manager would cause hardship to both parties as it will be a costly affair. It hardly lies in the mouth of the defendants to raise this complaint. From all I have said so far it is the defendants who have brought this hardship on the parties by their act of trying to divert the proceeds of the main contract, starve the 6th defendant of funds to operate, and make it difficult for the 6th defendant to operate the main contract by taking over possession of the camp site.

[68] For all the above reasons I would grant the plaintiff's application for the appointment of a receiver and manager.

[69] In the result I grant the plaintiff's application with costs and make the following orders:

1(a) An order that the 1st, 2nd and 3rd defendants be restrained and an injunction be hereby granted restraining the 1st, 2nd and 3rd defendants until the trial of this action or judgment whether by their agents servants, directors or any other means howsoever from dealing with the proceeds of payment from MINDEF under the main contract except in the manner set out in item (b) and (c) below or diverting or dissipating the proceeds of payment from MINDEF under the main contract;

(b) Consequent to (a) above, an order that the 1st, 2nd and 3rd defendants by each of them their agents servants and/or directors to pay all proceeds received from MINDEF under the main contract to the 5th defendant or the 6th defendant or to the receiver and manager of the 6th defendant;

(c) An order that the 1st, 2nd and 3rd defendants and each of them do forthwith on the making of this order instruct MINDEF to continue to pay all proceeds under the main contract to the 5th defendant.

2. An order that the 1st, 2nd and 3rd defendants and each of them be restrained and an injunction is hereby granted restraining the 1st, 2nd and 3rd defendants and each of them until further order or until trial/judgment whether by their

A agents servants, directors or any other means howsoever from interfering with or preventing the 6th defendant or its employees and the said receiver and manager carrying out their duties;

B 3. An order that Mr. David Wong Siew Chow of Moores Rowland, Kuching be appointed as a receiver and manager, without security, of the 6th defendant to manage generally the affairs of the 6th defendant pending the trial of this action or pending judgment, and specifically to:

C (a) collect, get in, receive and store all assets, properties, effects of businesses, monies, stock-in-trade, securities, deeds, books, documents and papers of or in the name of the 6th defendant (solely or otherwise) or in which the 6th defendant have any interest, legal or otherwise, in particular but without prejudice to the generality of the foregoing all property presently stored at the premises known as the camp site or 1st lot, referred to in the supplementary agreement dated 21 April 2004 or stored elsewhere.

E (b) collect, get in and receive all land any debts or receivables now or at anytime hereafter due and owing to the 6th defendant (solely or otherwise).

(c) pay, settle and/or compromise all and any debts or liabilities F now or at anytime hereafter due and owing by the 6th defendant (solely or otherwise).

(d) otherwise do all things reasonably necessary to manage the 6th defendant's business pending the trial of this action or pending judgment;

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4. An order for the parties, whether by themselves, their agents, servants or otherwise do forthwith deliver to the receiver and manager of the 6th defendant all assets, properties, effects of businesses, monies, stock-in-trade, securities, deeds, books, H documents, papers and keys to all relevant premises and to permit the said receiver and manager, whether by himself, his agents, servants otherwise access to all relevant premises of the 6th defendant.

I 5. An order that there is an inquiry into the accounts of the 6th defendant by the receiver and manager or such other independent third party;

6. An order for the said receiver and manager, whether by himself, his agents, servants or otherwise be at liberty and are permitted to do all such acts and things necessary for the purposes described in paras 3 to 5 above, without limiting the generality of the foregoing, including:

   (a) the right to enter upon the premises where the 6th defendant's business are being carried out, namely:

      (i) Camp Site or 1st Lot, referred to in the supplementary agreement dated 21 April 2004, and

      (ii) No. 6A, Jalan Tenku Ampuan Zabedah A9/A, Seksyen 9, 40000 Shah Alam, Selangor Darul Ehsan.

   (b) the power to appoint/retain solicitors to advice and/or act on behalf of and at the expense of the 6th defendant.

7. An order that the receiver and manager to submit accounts as required by O. 30 r. 4 of the Rules of the High Court at intervals of six months, commencing from six months from the date of the order made herein.

8. An order that the receiver and manager need not pay into court such balance as required by O. 30 r. 5 of the Rules of Court.

9. An order for that at intervals of 1 calendar month, commencing from one month from the date of the order made herein, the receiver and manager may pay himself on account of his fees and costs from funds received in his hand or the assets of the 6th defendant such amount as either may be agreed by both the plaintiff and the 1st defendant or may be certified/allowed by court.